Supreme Court, U. S.
FILED
JUL 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-5076

ERNEST FRANZILLE ARMSTRONG,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on April 14, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at __N.C.__, 212 S.E.2d 894 (1975), and is set out in Appendix A hereto, pp. 1a-5a, infra.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on April 14, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> N.C. Gen. Stat. §14-21(repl. vol. 1969): "Punishment for rape.--Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." 1/
>
> N.C. Gen. Stat. §15-187 (repl. vol. 1975): "Death by administration of lethal gas.--Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."
>
> N.C. Gen. Stat. §15-188 (repl. vol. 1975): "Manner and place of execution.--The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal

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1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

> gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on April 14, 1975, affirming petitioner's conviction and death sentence. Petitioner, Ernest Franzille Armstrong, a black man, was sentenced to die on March 21, 1974, in the Harnett County Superior Court of North Carolina upon conviction for the rape of Mrs. Roena Massey, a black woman.[2/]

2/ Petitioner's sentence of death was imposed under N. C. Gen. Stat. §14-21 (repl. vol. 1969), as construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (January 18, 1973). The North Carolina Legislature subsequently enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Session, 1974) effective April 8, 1974, which imposes the death penalty for certain "first degree" rapes. This statute, now codified as N.C. Gen. Stat. §14-21 (1974 supp.), provides:

> "Rape; punishment in the first and second degree.--Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:

Mrs. Massey, who was the 69 year old aunt of Sherill "Pem

2/ cont'd.

(a) First-Degree Rape--
(1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or
(2) If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.

(b) Second-Degree Rape--Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

However, the Supreme Court of North Carolina has expressly held that the enactment of this statute did not affect death sentences for rape imposed under the State v. Waddell procedure. In State v. Williams, __N.C.__, 212 S.E.2d 113 (1975), the Court affirmed a death sentence for "rape" which had been imposed under the Waddell procedure for a crime committed on May 16, 1973, which, if it had been committed after April 8, 1974, would appear to have been non-capital second-degree rape. The Court ruled that the 1974 rape statute was nowise retroactive:

> "In clear, explicit terms the Legislature provided 'This act shall become * * * applicable to all offenses hereafter committed.' Had these words been omitted, the Act would, nevertheless, apply to all offenses committed after its effective date, 8 April 1974. Consequently, these words were not used for the purpose of giving the Act that effect. It is a well established principle of statutory construction that a statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage . . . . We construe the provision in the 1974 Act, 'This act shall become * * * applicable to all offenses hereafter committed' as a saving clause, showing the intent of the Legislature to leave the preexisting statute in effect as to the elements of and punishment for the crime of rape committed prior to 8 April 1974."

212 S.E.2d at 119-120. Chief Justice Sharp, 212 S.E.2d at 123-125,

Pam" Stewart, first saw petitioner when he visited her home in

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2/ cont'd.

and Mr. Justice Exum, 212 S.E.2d at 121-122, dissented from this construction of the 1974 rape statute and would have applied it retroactively to invalidate a death sentence which was imposed "for a crime which is not now punishable by death," (212 S.E.2d at 125) (dissenting opinion of Chief Justice Sharp)).

In the decision announced in petitioner's case, a majority of the North Carolina Supreme Court declined to vacate petitioner's death sentence and to consider whether the evidence would have sustained only a non-capital second degree rape conviction in a post-April 8, 1974 case. Chief Justice Sharp, Mr. Justice Exum, and Mr. Justice Copeland dissented from this ruling for the reasons stated in the State v. Williams dissents. 212 S.E.2d at 898; App. A, infra, at 5a.

On June 24, 1975, the North Carolina General Assembly enacted H.B. 953, c. 749 (1975 Sess.), effective immediately, which provides that any defendant sentenced to death for a rape occurring after January 18, 1973, and prior to April 8, 1974, whose death sentence was sustained on appeal may apply to a trial judge of the judicial district in which the rape trial was held "to determine whether the defendant could have been punished by death had the rape been committed by him after the ratification of Chapter 1201, Session Laws of 1973," (Section 2(a)). Section 2 of this law provides:

> "(b) Said judge shall review a certified transcript of the evidence presented at trial (or if such transcript is not available, the record on appeal), make such independent investigation as he deems necessary to determine the age of the defendant or of the rape victim, and hear arguments or accept briefs in behalf of the defendant and the State.
>
> (c) Thereupon, the judge shall determine the following question:
>
> > Is the evidence presented at the defendant's trial, plus additional evidence of the age of the defendant or the age of the rape victim, sufficient to submit the defendant's case to a jury on the charge of first degree rape as defined by G.S. 14-21(a), had the date of the rape been after April 8, 1974?
>
> (d) If the question is answered in the affirmative, the defendant shall remain subject to the sentence of death. If the question is answered in the negative, the judge shall forthwith schedule a hearing for the presentation of evidence relative to resentencing the defendant; after the hearing, the sentence of death for rape previously imposed shall be vacated, and the defendant shall be resentenced as if he had been convicted of a second degree rape for a rape committed after April 8, 1974." (Emphasis added).

Coats, North Carolina, with Mr. Stewart at 7:30 p.m., November 10, 1973.[3/] Mrs. Massey "laughed and talked", R. 10, with her nephew (who, she later testified, appeared to her to have been drinking, R. 18) for about an hour; but petitioner, who said his name was "David", ibid., said nothing else and she said nothing to him. Stewart said he was going to his brother's surprise birthday party, R. 19, and told her that petitioner was "in the family," R. 11, because he was married to Stewart's wife's first cousin. Petitioner remained standing during the entire visit, although Mrs. Massey and her nephew were seated. R.18. The two men left about 8:30 p.m., and Mrs. Massey went to bed about 9:00 p.m. or 9:30 p.m. Ibid.

About five minutes after midnight on November 11, Mrs. Massey was awakened by the ringing of her doorbell. Thinking the caller was her granddaughter, she opened the door. Petitioner, who was wearing a pair of brown pants and a brown shirt with ruffles on it, R. 16, stepped into her house, telling her that "'Pem Pam said send him one of your stockings.'" R. 12. She was "positive" petitioner had been drinking because he smelled of alcohol. R. 20. She asked petitioner where her nephew was,

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3/ The State's evidence consisted of the testimony of four witnesses (Mrs. Massey; L. R. Doffermyre, a medical doctor who examined Mrs. Massey on November 11, 1973; and two policemen, Ronald V. Peters and Charles L. Beegle) and three exhibits (the pants and shirt petitioner was wearing on the night of the rape, and a statement which the police took from Mrs. Massey.) However, no chemical tests were performed on the clothes and Mrs. Massey's statement was introduced for corroboration and not as substantive evidence. The presentation of the State's case occupies 22 pages of the 74-page record on appeal.

since petitioner appeared to be alone. He did not respond to her question but simply repeated that "Pem Pam said . . . to send him one of . . . [her] stockings," ibid. Petitioner followed Mrs. Massey into the den of the house:

> "I told him I weren't going to do it and after a while he said 'you ain't going to send him the stocking then?' I said 'No.' I said 'Go tell Pem Pam I said go home to his wife and family and go to bed because I am not going to send it [']and I meant just that, and by that time he was just staring at me so fearless until I saw there was something in him that weren't right and I got frightened and I began to back off from him and as I was backing off. [sic] I just had my gown on. When I got frightened, well, I begin to back back [sic] towards my kitchen sink and he was advancing up on me, and he just kept advancing up on me as I was walking backwards.
>
> He says 'I tried to talk nice to you [']and says [']you wouldn't listen but I bet you will.'"

R. 12. Petitioner then seized Mrs. Massey and put his arm around her neck and his hand over her mouth; he declared "'do like I tell you and I won't hurt you.'" Ibid. He repeated "'and you ain't going to send the stocking?'", R. 13, and when she said no, he gagged her with a pair of nylon hose which were lying on a chair:

> "He didn't say why he did this, only he just said 'I'm going to do something, I am going to do somethibg [sic], do something like Pem Pam is doing over there in that white house. I'm going to do something, that is all. Do like I tell you and I won't hurt you, do like I tell you and I won't hurt you.' After he put the panty hose in my mouth there was nothing I could do. I sure was frightened then, you know I was. He just kept pulling on me and seesawing me and zigzagging me until he got me in my bedroom and he said 'be nice now and I won't hurt you, be nice now and I won't hurt you. I am going to do like Pem Pam is doing over yonder in that white house. I am going to do something.' He didn't say what he was going to do. No, he didn't, and when I got there beside of my bed I had a scatter rug

> there beside the bed on the floor and when I stepped on that rug I slipped to my knees and he told me then to [']get up and get on the bed, get up and get on the bed. Be nice and I won't hurt you.'"

R. 13-14.

Petitioner maneuvered her onto the bed and had sexual intercourse with her. He carried no weapon of any kind and Mrs. Massey testified that he did not strike her. R. 21. She "did not at any time scream out on this particular night," R. 20, because "I ain't never been no scareder since I have been born in the world than I was then." R. 14.

Petitioner said nothing while he put his clothes on. As he left, he inquired, "'You ain't going to put the law on me is you?'", R. 15, and Mrs. Massey said she would not. He asked if she had a telephone and she said that she did not. Ibid. He then said: "'If I come back here and knock the door lightly and say, It's David, will you open the door and let me in?'" Ibid. She said she would, and petitioner left, carrying the nylon hose with him. Mrs. Massey immediately went to her granddaughter's house, about a block away, and told her what had happened. Her granddaughter then called the police. Ibid.

Doctor L. R. Doffermyre testified that he had performed an internal examination of Mrs. Massey at 11:00 a.m., November 11, 1973. She told him that she had been raped about ten hours earlier by a black male whose name she did not know but who had

visited her home with her nephew the previous evening. The mucus membrane of the vagina exhibited a slight tear, but there was no bleeding. Sperm were found in the vagina and Dr. Doffermyre concluded that "she had definitely had intercourse." R. 26.

The Coats Chief of Police, Ronald V. Peters, testified that he had conversed with Mrs. Massey at her house at 1:15 a.m., November 11, 1973. She told him she had been raped and he wrote out a "verbatim" statement, R. 29, of what she told him. Mrs. Massey signed this statement, ibid., which was introduced at trial to corroborate her testimony. Chief Peters testified that he knew the "general character and reputation" of Mrs. Massey in the community in which she resides and that it was "very good." R. 31. Another Coats policeman, Charles L. Beegle, testified that when he arrested petitioner at his house at 2:00 a.m., November 11, 1973, he saw clothing described by Mrs. Massey on petitioner's couch. R. 32. Beegle seized a pair of brown trousers and a brown shirt with ruffles. R. 27, 32. Mrs. Massey identified these items as the clothes petitioner wore on the two occasions when he visited her house. R. 27.

Petitioner testified in his own defense and did not deny having sexual intercourse with Mrs. Massey in the early morning of November 11, 1973. He claimed, however, that on his first visit to Mrs. Massey's house, she had spoken to him while her nephew was in the bathroom and had invited him to return alone later that night. R. 38. Petitioner testified that, when he

returned shortly after midnight, she knowingly let him into the house, voluntarily disrobed, and acquiesced in his desire to have intercourse.[4/] Sherill "Pem Pam" Stewart testified as a

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4/ Both petitioner and Stewart testified that they had been drinking heavily before and after their visit to Mrs. Massey's house. R. 34, 41-42. Petitioner testified that during Stewart's brief absence to go to the bathroom, Mrs. Massey "asked me could I come back and I told her I didn't know if I would come back later because I works and I didn't know if I could come back that night due to that was my first time at her home, but I would see about it." R. 37-38.

> "After I arrived the second time I rang the doorbell and she came and opened the door, and seen who I was and she said 'Come in'. So, I walked in and we walked to the kitchen area or rather the den area where we had -- which we had a conversation there and that is where we came up with about sex. She told me that she could fool a lot of men, lot of young men and I told her if she could I would like for her to fool me. So, and then we talked and I just can't remember all exactly what we said then and then we moved into the bedroom.
>
> After moving into the bedroom she sit on the bed and stood at the foot part of the bed and she laid down, after she had layed down then I sit on the bed and while talking to her I leaned over and placed my hands on her shoulder and we talked. So, I got up and she asked me then 'What are you going to do?' And, I said 'I can't do nothing with my clothes on.' So she begin to pull up her gown and I stood near the foot of the bed and opened my pants and my underwear and after that -- well, proceeded in the bed. I had intercourse with her at that time."

R. 38. As petitioner started to leave,

> "[s]he asked me 'Would you be coming back?' I said I don't know whether I will get back soon or not and after that I started to walk, I left off the porch and went to the -- I got in the yard between her porch and my car and she told me said 'I don't want to hear anything else about this.' So, I said, 'I can't, I'm married too.' So, she asked me before I got to my car, she said 'Do you have any money

defense witness, corroborating several details of petitioner's testimony, although he stated that he did not hear petitioner and Mrs. Massey conversing while he was in the bathroom. R. 34-35.

Petitioner was committed to the Dorothea Dix Hospital in Raleigh, North Carolina, for a competency examination before trial. Although he was found to be "somewhat retarded," R. 7, with a history of "blackout spells", ibid., and although he was determined to be "functioning at a sub-normal intelligence level," ibid., he was pronounced "Not insane" and "competent to stand trial at the present time" R. 8. 5/

4/ cont'd.

> on you?' and I said 'No, I don't have any [,] not right now.' I said I don't have any right now because the money that I was using I got that from Pem Pam which he had borrowed and I got in my car and left."

R. 39. According to petitioner, he weighed 236 pounds and was five feet, nine inches tall: "I really couldn't say how much Roena [Massey] weighed . . . I suppose she does weigh considerably less than I do. She did not tell me she was 69 years old." R. 40. Petitioner admitted that he had been convicted of "destroying State property," ibid., jumping off a train on the hood of a police car," ibid., "white slavery," ibid.,"shooting [a pistol illegally]," ibid., "robbery," R. 41,"attempt to commit robbery," ibid., and "escape," ibid. A great deal of the State's cross examination was spent delving into the facts of these criminal convictions and other alleged criminal activity, and to establishing the amount of time that petitioner had spent in jail and in prison. See R. 39, 40-41, 43, 48-50.

5/ The psychiatric report prepared after petitioner's examination concluded:

> "Mental Status and Physical Examination: Upon admission he seemed somewhat retarded but was cooperative. Again he complained of occasional dizzy spells and voices calling his name. He gave rational answers most of the time, but he is circumstantial [sic] for moments. He is oriented with memory defect for some events, doing poorly

At the conclusion of the evidence, the trial court charged the jury that it could find petitioner guilty of rape, R. 65, guilty of assault with intent to commit rape, R. 65, guilty of assault on a female, ibid., or not guilty, ibid. The jury returned a verdict of guilty of rape, R. 67, and the court thereupon sentenced petitioner to death. R. 69.

On April 14, 1975, the Supreme Court of North Carolina, with three Justices dissenting in regard to the death penalty, affirmed petitioner's conviction and death sentence. 6/

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

After the jury's verdict was announced, petitioner's counsel moved "that the death penalty not be imposed inasmuch as being unconstitutional in this case." R.68.This motion was denied.R.69.Petitioner's Assignment of Error Number 5 contended that there was errr "[a]s to the imposition of the death penalty in this case being cruel and unusual punishment." R. 74. The Supreme Court of North Carolim rejected this claim:

5/ cont'd.

> in simple calculations. He had very limited general knowledge and seems to be functioning at a sub-normal intelligence level. His physical examination was essentially normal limits [sic]."

R. 7.

6/ On April 28, 1975, Chief Justice Sharp granted a stay of execution "pending further orders of this court" to enable petitioner to file a petition for a writ of certiorari.

> "[d]efendant contends that imposition of the death penalty is legally unauthorized and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States. This contention has heretofore been considered and determined to be without merit in various cases, including State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Dillard, 285 N.C. 72, 203 S.E.2d 6 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). Defendant's . . . assignment of error based on this contention is overruled."

State v. Armstrong, __N.C.__, 212 S.E.2d 894, 897 (1975); App. A, infra, at 4a.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" sections, respectively, of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974), at 11-51 (attached as Appendix B, infra) and of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Noell v. North Carolina, No. 73-6876 (filed June 11, 1974), at 19-22 (attached as Appendix C, infra). On October 29, 1974, this Court granted certiorari in Fowler v. North Carolina, No. 73-7031, to consider a similar question.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendix A

State v. Armstrong, __N.C.__,
212 S.E.2d 894 (1975).

STATE of North Carolina

v.

Ernest Franzille ARMSTRONG.

No. 10.

Supreme Court of North Carolina.

April 14, 1975.

Defendant was convicted in the Superior Court, Harnett County, Hamilton H. Hobgood, J., of rape, was sentenced to death, and he appealed. The Supreme Court, Huskins, J., held that force necessary to constitute rape need not be actual physical force but fear, fright, or coercion could take its place; that the evidence was sufficient to support the conviction; that the imposition of the death penalty was legally authorized and did not constitute cruel and unusual punishment; and that where the only dispute between the State and the defendant was whether the act of intercourse was accomplished by consent or by force, there was no necessity to submit the lesser included offenses of assault with intent to commit rape and assault on a female.

No error.

Sharp, C. J., and Copeland and Exum, JJ., dissented as to the death sentence and filed opinions.

1. Rape ⇐1

Rape is carnal knowledge of female person by force and against her will.

2. Rape ⇐6

Actual physical force is not necessary to constitute rape, but fear, fright or coercion may take its place.

3. Rape ⇐11

Although consent by female is complete defense to charge of rape, there is no legal consent when it is induced by fear of violence.

4. Rape ⇐51(4)

Evidence, including testimony of victim that she did not consent to intercourse, and that she resisted to best of her ability but that her struggle ceased when she realized that she was helpless to protect herself and was in fear of death or serious bodily harm, was sufficient to sustain conviction of rape and to warrant denial of motion to set aside verdict as being contrary to weight of evidence.

5. Criminal Law ⇐935(1)

Motion to set aside verdict as being contrary to weight of evidence is addressed to discretion of trial judge.

6. Criminal Law ⇐970(1)

Motion in arrest of judgment is made after verdict is designed to prevent entry of judgment, and is based upon insufficiency of indictment or some other fatal defect appearing on face of record.

7. Criminal Law ⇐1088.1

Record proper in criminal case ordinarily consists of organization of the court, the charge, i.e., information, warrant or indictment, arraignment and plea, the verdict, and the judgment.

8. Criminal Law ⇐972

Where face of record proper in rape prosecution revealed no fatal defect, denial of defendant's motion in arrest of judgment of conviction was proper.

9. Criminal Law ⇐1213
Rape ⇐64

Imposition of death penalty for rape was legally authorized and did not constitute cruel and unusual punishment. U.S.C.A.Const. Amends. 8, 14.

10. Rape ⇐59(20)

In rape prosecution, wherein only dispute between State and defendant was whether admitted act of sexual intercourse was accomplished by consent or by force, there was no necessity to submit lesser in-

cluded offenses of assault with intent to commit rape and assault on female.

11. Criminal Law ⇐795(1)

Lesser included offenses must be submitted only where there is evidence to support them.

12. Criminal Law ⇐1165(3)

Error favorable to defendant did not warrant reversal.

Defendant was tried upon a bill of indictment, proper in form, charging him with the rape of Roena Massey on 11 November 1973 in Harnett County.

The State offered evidence tending to show that Roena Massey is the aunt of Sherill Donald Stewart. At approximately 5 p.m. on 10 November 1973 the defendant Ernest Franzille Armstrong and Sherill Donald Stewart were together in the town of Benson drinking scotch and beer. About 7:30 p.m. they went to the home of Roena Massey in the nearby town of Coats where they remained for approximately one hour. Roena Massey did not know defendant and had never seen him before. Both men stated that Stewart's wife and defendant's wife were first cousins. They left about 8:30 p.m., and Roena Massey went to bed around 9:30 p.m.

The two men toured several night spots in Harnett County and separated after returning to Benson. Defendant returned to the home of Roena Massey about midnight, and she was awakened when he rang the doorbell. She arose, turned on the light, unlocked the wooden door and then unlocked the storm door. Defendant stepped inside. Mrs. Massey said she thought it was her granddaughter and opened the door without paying much attention.

Defendant followed Mrs. Massey into the den. She asked him what he was doing there, and he replied: "Pem Pam [Sherill Donald Stewart] said send him one of your stockings." Mrs. Massey informed defendant she would do nothing of the sort. Defendant was staring at her and she commenced to back away while defendant was advancing upon her. Defendant said, "I tried to talk nice to you and you wouldn't listen but I bet you will." He threw his arms around her neck, placed his hand over her mouth and said, "Do like I tell you and I won't hurt you."

Defendant gagged Mrs. Massey with her panty hose, forced her into the bedroom and raped her. Defendant thereupon left after exacting a promise from her that she would not "put the law on him." Mrs. Massey then ran to the nearby home of her granddaughter, told her what had happened, and she called the police.

Mrs. Massey was examined by Dr. Doffermyre at 11 a.m. on 11 November 1973. She gave the doctor a history of having been raped the night before by a colored man whose name she did not know. The examination revealed the presence of sperm in all microscopic fields, and Dr. Doffermyre stated that unquestionably the patient had had intercourse. The bottom wall of the vaginal vault revealed a split in the mucous membrane one and one half inches long, and the injury appeared to be recent.

The State's evidence further shows that Mrs. Massey was sixty-nine years of age and weighed approximately 110 pounds. She had lived in and around the town of Coats for approximately twenty years and had no criminal record. The police chief testified that her general reputation in the community was very good.

Defendant, testifying in his own behalf, stated that he and Stewart were drinking, and while they were at Mrs. Massey's home he told her his name was "Cherry" and she asked him to return later. In response to that invitation he returned about midnight and was admitted to her home. They engaged in sexual relations by mutual consent. Thereafter they talked for a while and she accompanied him to the front door when he departed.

On cross-examination defendant stated that he was thirty-one years old and

weighed 236 pounds; that he had been convicted of destroying State property in Benton, Louisiana, and of other crimes in El Paso, Texas, Montgomery, Alabama, Jacksonville, Florida, Texarkana, Arkansas, and New Orleans, Louisiana.

Sherill Donald Stewart testified that he and defendant went to the home of Roena Massey about 7:30 p.m. on 10 November 1973 and stayed about forty-five minutes; that he left the room on one occasion while they were there and, of course, heard no conversation between defendant and Mrs. Massey during his absence. He stated that defendant said nothing about returning to Mrs. Massey's home but said he was going home when they parted about 9:30 p.m.

The trial court instructed the jury to return one of the following verdicts: Guilty of rape, guilty of assault with intent to commit rape, guilty of assault on a female, or not guilty. The jury convicted defendant of rape, and he was sentenced to death. From that judgment he appeals to this Court assigning errors noted in the opinion.

Robert Morgan, Atty. Gen., and William F. O'Connell, Asst. Atty. Gen., Raleigh, for the State of North Carolina.

Wiley F. Bowen, Dunn, for defendant-appellant.

HUSKINS, Justice:

The defense in this case is based on consent. Defendant contends the evidence relied upon by the State to show resistance on the part of Mrs. Massey is inconclusive and the trial judge failed to declare and explain the law, as required by G.S. § 1-180, relative to Mrs. Massey's conclusion that resistance on her part would be useless. This constitutes the basis for defendant's first assignment of error.

The court charged on this point as follows:

"Now, I charge you for you to find the defendant guilty of rape the State must prove three things beyond a reasonable doubt:

First, that the defendant had sexual intercourse with Roena Massey.

Second: That the defendant used or threatened to use force sufficient to overcome any resistance she might make. Now, in reference to force the court instructs you that force necessary to constitute rape need not be actual physical force. Fear, fright or coercion may take the place of force. While consent by the female, Roena Massey, is a complete defense for the defendant, consent which is induced by fear of violence is void and is not legal consent.

Consent of the woman for fear of personal violence is void. Even though a man lays no hand on a woman yet if by an array of physical force he so overpowers her mind that she dares not resist or she ceases resistance through fear of great harm, the consummation of the unlawful intercourse by the man is as a matter of law rape.

The third point that must be proven to you by the evidence and beyond a reasonable doubt is that Roena Massey did not consent and it was against her will."

[1-3] The quoted portion of the charge clearly enunciates the law of this State. Rape is the carnal knowledge of a female person by force and against her will. State v. Flippin, 280 N.C. 682, 186 S.E.2d 917 (1972). Fear, fright or coercion may take the place of actual physical force. State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969). Although consent by the female is a complete defense to a charge of rape, there is no legal consent when it is induced by fear of violence. State v. Carter, 265 N.C. 626, 144 S.E.2d 826 (1965).

[4] Mrs. Massey testified, among other things, that she was terribly frightened; that "he had done throwed his arm around my neck like that and was choking me (indicating) and hand come over my mouth. . . . I sure was frightened. . . . He was holding me by my neck . . . I began to give up because I didn't know where he was going to kill me or what he

was going to do to me and I was there alone in that house by myself. . . . I couldn't get away from him because he had me around the neck like this choking me and his hand over my mouth there weren't no way for me to. . . . He just kept pulling on me and seesawing me and zigzagging me until he got me in my bedroom . . .. I ain't never been no scareder since I have been born in the world than I was then. . . . Weren't no way in this world for me to yell for help no way."

There is nothing in the testimony of Mrs. Massey to support the suggestion that she consented. The only reasonable inference to be drawn from her testimony is that she did not consent and that she resisted to the best of her ability. Her struggles ceased when she realized she was helpless to protect herself and was in fear of death or serious bodily harm at the hands of a thirty-one year old man weighing 236 pounds. Hence, in accordance with well established legal principles, there was ample evidence to support defendant's conviction for rape. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969). Defendant's first assignment of error is overruled.

Failure of the court to set aside the verdict and arrest judgment constitutes defendant's second assignment of error. We find no merit in this assignment for the reasons stated below.

[5] A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial judge. State v. Arnold, 284 N.C. 41, 199 S.E.2d 423 (1973); State v. Henderson, 276 N.C. 430, 173 S.E.2d 291 (1970). The evidence amply supports the verdict. No abuse of discretion is shown.

[6] A motion in arrest of judgment is made after verdict, designed to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record. State v. McCollum, 216 N.C. 737, 6 S.E.2d 503 (1940). "In a criminal prosecution, however, judgment may be arrested when—and only when—some fatal error or defect appears on the face of the record proper." State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970); State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

[7, 8] The record proper in criminal cases ordinarily consists of (1) the organization of the court, (2) the charge, *i. e.*, the information, warrant or indictment, (3) the arraignment and plea, (4) the verdict, and (5) the judgment. State v. McClain, 282 N.C. 357, 193 S.E.2d 108 (1972); State v. Tinsley, 279 N.C. 482, 183 S.E.2d 669 (1971). Here, the face of the record proper reveals no fatal defect, and denial of defendant's motion in arrest of judgment was proper. Defendant's second assignment of error is overruled.

[9] Finally, defendant contends that imposition of the death penalty is legally unauthorized and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States. This contention has heretofore been considered and determined to be without merit in various cases, including State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Dillard, 285 N.C. 72, 203 S.E.2d 6 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). Defendant's third assignment based on this contention is overruled.

[10-12] It should be noted that all of the evidence in this case reveals a completed act of sexual intercourse. The only dispute between the State and the defendant is whether the act was accomplished by consent or by force. Under those circumstances there was no necessity to submit the lesser included offenses of assault with intent to commit rape and assault on a female. Lesser included offenses must be submitted only when there is evidence to support them. State v. Watson, 283 N.C. 383, 196 S.E.2d 212 (1973); State v. Bryant,

280 N.C. 551, 187 S.E.2d 111 (1972). Submission of the lesser included offenses, however, was error favorable to the defendant and affords him no grounds for relief.

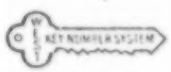
We have carefully examined the entire record and conclude that defendant received a fair trial, free from prejudicial error. The trial, verdict and judgment must therefore be upheld.

No error.

SHARP, Chief Justice, dissents as to the death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in her dissenting opinion in State v. Williams, 286 N.C. 422, 434, 212 S.E.2d 113, 123 (1975).

COPELAND, Justice, dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 422 at 437, 212 S.E.2d 113 (1975).

EXUM, Justice, dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).



James T. SPEIGHT and Maggie B. Speight

v.

Elijah H. GRIFFIN and Edith V. Griffin.

No. 7418SC899.

Court of Appeals of North Carolina.

March 19, 1975.

Plaintiff brought action against defendants, the owners of an adjoining lot, to recover for trespass and diversion of surface water onto plaintiff's property. The Superior Court, Guilford County; James M. Long, J., allowed defendants' motion for judgment notwithstanding the verdict in favor of plaintiff and entered judgment in favor of defendants. The plaintiff appealed. The Court of Appeals, Vaughn, J., held that defendants, whose land was higher than plaintiff's adjoining property, were not liable to plaintiff for damage caused by the flow of surface waters that occurred when defendants' old gravel driveway, that tended to absorb and drain surface waters away from plaintiff's property, was replaced with a concrete driveway that did not absorb and drain water away from the lower lot.

Affirmed.

Waters and Water Courses ⇐119(1)

Defendants, whose land was higher than plaintiff's adjoining property, were not liable to plaintiff for damage caused by the flow of surface waters that occurred when defendants' old gravel driveway, that tended to absorb and drain surface waters away from plaintiff's property, was replaced with a concrete driveway that did not absorb and drain water away from the lower lot.

This is an action to recover for trespass and diversion of water onto plaintiff's property.

Plaintiff and defendants are adjoining lot owners on Willow Road in a subdivision in Guilford County. Defendants' property is on higher ground than plaintiff's. Defendants formerly had a gravel driveway which ran from the street towards the rear of the lots and was located near the property line of the parties. There was no problem with water from defendants' higher lot. The water generally flowed down the gravel driveway to the rear of the lots. Plaintiff

Appendix B

Pp. 11-51, Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This case and four contemporary cases[6/] present the question of the constitutionality of the death penalty as that penalty was resurrected in the State of North Carolina by a four-to-three vote of the North Carolina Supreme Court following Furman v. Georgia, 408 U.S. 238 (1972). A brief review of post-Furman developments relating to the death penalty in the United States generally and in North Carolina particularly sets the question in perspective.

The nearly universal response of state courts in obedience to Furman was to hold that death sentences could no longer be meted out under the capital punishment laws which had been in effect prior to June 29, 1972, and which the Furman decision

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6 / Crowder v. North Carolina, O.T. 1973, No. 73-
Henderson v. North Carolina, O.T. 1973, No. 73-
Jarrette v. North Carolina, O.T. 1973, No. 73-
Noell v. North Carolina, O. T. 1973, No. 73-

of that date declared unconstitutional.[7] Subsequently, statutes

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7/ See, e.g., United States v. Lee, 489 F.2d 1242 (CA DC 1972); United States v. Woods, 484 F.2d 127, 138 (CA4 1973) ("Since the decision in Furman v. Georgia, ... the statute under which defendant was convicted of first degree murder, 18 U.S.C. §111, provides as the only possible sentence imprisonment for life" at 138); United States v. McNally, 485 F.2d 398 (CA8 1973); Hubbard v. State, 290 Ala. 118, 274 So.2d 298 (1973) ("There is no question that Furman has, as of now, eliminated the death penalty from our statute. The elimination of the death penalty does not destroy the entire statute. The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment." 274 So.2d at 300); State v. Endreson, 109 Ariz. 117, 506 P.2d 248 (1973) ("In view of [the Furman ruling] we hold that the death penalty provisions of [the Arizona murder statute] are unconstitutional." 506 P.2d at 254); O'Neal v. State, 253 Ark. 574, 487 S.W. 2d 618 (1972); People v. Murphy, 8 Cal. 3d 369, 105 Cal. Rptr. 138, 503 P.2d 594 (1972); State v. Aillon, ___ Conn. ___, 295 A.2d 666 (1972); Anderson, et al., v. State, 267 So. 2d 8 (Fla. 1972); Sullivan et al. v. State, 229 Ga. 731, 194 S.E. 2d 411 (1972); People v. Speck, 52 Ill. 2d 284, 287 N.E. 2d 609 (1972) ("The Supreme Court of the United States has now held that a defendant could not be validly sentenced to death under [pre-Furman Illinois capital statutes]." 287 N.E.2d at 700; Adams v. State, ___ Ind. ___, 284 N.E.2d 757 (1972); State v. Randol, 212 Kan. 461, 513 P.2d 248 (1973) (". . .court is of the opinion that the death penalty provision of our present statute is constitutionally impermissible. The 1972 Legislature of Kansas considered but failed to enact amendatory legislation." 513 P.2d at 256); Caine and McIntosh v. Commonwealth, 491 S.W.2d 824 (Ky. 1973), cert. den. 414 U.S. 876; State v. Flood, 263 La. 700, 269 So.2d 212 (1972) ("the Furman case has eliminated 'capital offenses' in Louisiana." 269 So.2d at 214); Bartholmey v. State, 267 Md. 175, 297 A.2d 696 (1972); Commonwealth v. LeBlanc, ___ Mass. ___, 299 N.E.2d 719 (1973); Capler v. State, ___ Miss. ___, 268 So. 2d 338 (1972) (". . . the harsher penalty of death may not be lawfully imposed. The remaining part of the statute is complete. . . .We hold that because of Furman v. Georgia, the death penalty cannot be inflicted, that the remainder of the statute is valid and the only other punishment for murder is life imprisonment." 268 So.2d at 339-40); State v. Scott, 491 S.W.2d 514 (Mo. 1973) ("The sole and only punishment for first degree murder in this state is now life imprisonment." at 521); State v. Alvarez, No. 27435, Dist. Ct. Lancaster Cty., Neb. Oct. 4, 1972; Walker v. State, 88 Nev. 539, 501 P.2d 651 (1972); State v. Martineau and Nelson, 112 N.H. 278, 293 A.2d 766 (1972); People v. Fitzpatrick, 32 N.Y. 2d 499, 300 N.E. 2d 139 (1973), cert. den. 38 L.Ed. 2d 338, 94 S.C. 554 (1973); State v. Johnson, 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972) ("Under [the Furman] holding, which we are required to follow, the infliction of the death penalty under the existing law of Ohio is now unconstitutional [with possible exceptions not relevant here]." 285 N.E. 2d at 755); Pate v. State, 507 P.2d 915 (Okla. 1973) ("After an exhaustive study of the [Furman] opinions . . . this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as

were enacted in slightly more than half the States (and by the federal government), authorizing the use of the punishment of death in differingly defined categories of cases.[8] The statutes vary widely in their terms and forms, and consequently vary

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7/ cont'd

the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia," at 916); Commonwealth v. Bradley, 449 Pa. 19; 295 A.2d 842 (1972); Hunter, et al. v. State, ___ Tenn. ___, 496 S.W.2d 900 (1972) ("The effect of [Furman] . . . is to render void the penalty of death as it exists under the statutes of Tennessee." 496 S.W.2d at 902); Lopez v. State, 500 S.W.2d 844 (Tex. Crim. 1973) (". . . we find the inescapable conclusion to be that the holding in Furman and Branch rendered it impermissible under the Constitution of the United States to impose the death penalty under our ten existing statutes." At 846); Wood v. Commonwealth, 213 Va. 346, 192 S.E.2d 808 (1972); State v. Vidal, 82 Wash.2d 94, 508 P.2d 158 (1973) ("The recent case of Furman v. Georgia . . . has the effect of preventing the imposition of the death penalty under the existing statutes of the State of Washington." 508 P.2d at 162).

8/ Some of these new statutes provide that a court or jury must make a separate determination as to whether a defendant should be sentenced to life or death independently of its finding the defendant guilty of a capital crime; conviction of a particular offense does not, therefore, necessarily result in a death sentence. Some of these laws provide a single verdict proceeding, in which the trial judge or jury must return a general verdict finding a defendant guilty of a capital degree of the offense. Del. Code, tit. 11, § 636 (1974), as amended by Del. H.B. No. 429, 127th Gen. Ass. (1974); N.H. Rev. Stat. Ann. § 630:1(I) (1973), as amended by N.H. S.B. 27, Chap. 34, Acts of 1974, N.H. Gen. Ct.; N.Mex. Stat. §§ 40A-2-1, 40A-2-1(A), 40A-29-2 (1974); N.C. Gen. Stat. §§ 14-17, 14-21, as amended by S.B. 157, Chap. 1201, 1973 Sess. Laws (2nd Sess. 1974); Tenn. Code Ann. §§ 39-2402 (as amended by Pub. Chap. 462, Tenn. Laws 1974), 39-3702 (as amended by Pub. Chap. 461, Tenn. Laws 1974) (1974). Others of these statutes provide a unitary proceeding where a jury must return a verdict finding special facts to justify the death sentence. Ind. Code § 10-3401 (1974); Ky. Rev. Stat. Chap. 507, as amended by Ky. H.B. No. 232, Reg. Sess. 1974; La. Rev. Stat. §§ 14:30, 14:42, 14:44, 14:113 (1974); La. Code

somewhat in the questions they present regarding their compliance with Furman and with the Eighth and Fourteenth Amendments to

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8/ cont'd

Crim. Proc., Art. 557, 598, 817 (1974); Miss. Code §§ 97-3-19, 97-3-65 (1974), as amended by Miss. S.B. No. 2341, Reg. Sess. 1974; Mont. Code §§ 94-5-102, 94-5-103, 94-5-105, 94-5-304 (as amended by Mont. H.B. No. 643, Mont. Gen. Laws 1974) (1974); Nev. Code § 200.030 (1974); Okla. Stat., tit. 21, §§ 701.1, 701.3, 701.6 (1974); Wyo. Stat. § 6-54 (1974). Among the new laws which provide a bifurcated proceeding to make this separate determination as to sentence, some allow imposition of sentence without any particular finding identified by the legislature as a prerequisite for imposing either a sentence of death or life imprisonment. Ga. Code § 27-2534.1 (1973), as amended by No. 74, Ga. 1973 Sess. Laws at 162-172; Utah Crim. Code §§ 76-3-206, 76-5-202, 76-5-302, 76-3-207 (1974). Others of these bifurcated trial statutes require the imposition of a death sentence when a certain finding is made at the sentencing proceeding; some identify a particular circumstance which justifies imposition of a death sentence. Cal. Penal Code §§ 190, 190.1, 190.2, 209, 219, 4500 (1974); Ill. Code §§ 5-8-1a, 9-1 (1974); Tex. Pen. Code § 19.02 (1974); Tex. Code Crim. Proc., Art. 37.071 (1974); others identify such circumstances but provide that such "aggravating" circumstances may be counterbalanced by the finding of "mitigating" circumstances in some unspecified fashion, Ariz. Rev. Stat. §§ 13-452 - 13-454 (1974; Ark. Code §§ 41-4702 - 41-4713 Fla. Stat. §§ 782.01, 794.01, 792.141 (1974); Neb. Code §§ 28-401, 29-2522, 29-2523, 29-2524 (1974); still others provide formulae for the weighting of "aggravating" against "mitigating" circumstances to determine which defendants shall be sentenced to death. Conn. Gen. Stat. § 53a-45 (1974); Ohio Rev. Code §§ 2929.03, 2929.04 (1974); Pa. Stat., tit. 18, § 4701 (1974), as amended by Pa. H.B. 1060, Act. 46, 1974 Sess.

Another group of statutes provides for the imposition of a death sentence by operation of law pursuant to a jury's or trial judge's conviction of a certain crime. Idaho Code §§ 18-4003, 18-4004 (1974); R.I. Code § 11-23-2 (1974); New York: Ass. Bill 11474, 1974 Sess. Laws.

The following States have not enacted legislation authorizing the death penalty since Furman: Alaska, Alabama, Colorado, Hawaii, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Dakota, Oregon, South Carolina, South Dakota, Virginia, Washington, West Virginia, Wisconsin, Vermont.

the Constitution.[9] It is a fair although gross generalization that, in most States, the new statutes authorize capital punishment for a narrower category of offenses than those that were punishable by death in the same States before Furman. Of the 103 men and women who have been sentenced to die in the United States since June 29, 1972, and who are presently on death row,[10] roughly two-thirds were condemned under the new post-Furman statutes.

Virtually all of the remainder[11] -- 31 men and women, to be

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9/ The first decisions by the highest court of any State affirming death sentences imposed under one of the new post-Furman statutes were handed down in a Georgia murder case, State v. House, Ga. Sup. Ct. No. 28678 (April 4, 1974) (rehearing denied, April 25, 1974); and in a Georgia rape case, State v. Eberheart, Ga. Sup. Ct. No. 28776 (April 30, 1974) (rehearing denied, May 21, 1974). Counsel for Mr. House and Mr. Eberheart (who include some of the counsel for petitioner Dillard) are presently preparing to seek review by this Court of the Georgia Supreme Court's decisions.

10/ We exclude from this computation a number of persons sentenced to death since Furman whose convictions or death sentences have been reversed or vacated on appeal. The 99 figure represents persons presently committed under unreversed and unvacated sentences of death.

11/ Seven persons have been sentenced to die since Furman under the provisions of pre-Furman statutes. The cases of six of these persons (in Massachusetts, Montana, Pennsylvania, and South Carolina) are described in note 14, infra. The remaining case arises under a Virginia statute which the Virginia Supreme Court held distinguishable from the statutes invalidated in Furman. State v. Jefferson, Va. S.C., No. 730370, decided April 22, 1974. A petition for rehearing is presently pending in Jefferson. Should it be denied, counsel for Mr. Jefferson (who are associated with some of the counsel for petitioner Dillard) anticipate that review will be sought in this Court.

exact -- are on death row in North Carolina, where post-Furman developments took a markedly different turn by the margin of a single vote on the North Carolina Supreme Court in the case of State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). Prior to 1947, North Carolina law had required the imposition of the death penalty upon all convictions for the crimes of first-degree murder, rape, first degree burglary, and arson. By enactments of 1947 and 1949, the North Carolina General Assembly provided that, in the case of convictions for any of these four offenses, the jury might spare the defendant's life by a recommendation of life imprisonment. 12/ An unanimous Supreme Court of North Carolina

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12/ The jury was given the power to recommend life imprisonment in arson and burglary cases in 1947, and in murder and rape cases in 1949. We have found no legislative history dealing directly with the 1947 enactment.

The limited legislative history available for the 1949 North Carolina legislative action reflects a clear and considered abandonment of a general mandatory death penalty. As noted in State v. Pugh, 250 N.C. 278, 168 S.E.2d 649, 642 (concurring opinion of Denny, J.), the 1947 General Assembly created a Special Commission for the Improvement of the Administration of Justice. That Commission recommended, inter alia:

> "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder, because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. Our proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes."

[footnote continued]

concluded in Waddell that, as amended in 1947 and 1949 and operative for nearly a quarter-century between 1949 and 1972, the North Carolina statutes inflicting capital punishment for first degree murder, rape, first degree burglary and arson were unconstitutional under Furman. Three Justices of the court therefore would have held that the death penalties provided by North Carolina law on the dates of the Furman and Waddell decisions were constitutionally unenforceable then and thenceforth until (at the least) the enactment of new capital punishment legislation by the General Assembly. But a majority of four Justices

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12/ cont'd.

POPULAR GOVERNMENT (January 1949) (published by the Institute of Government, University of North Carolina, Chapel Hill, North Carolina), p. 13. The North Carolina Supreme Court commented on the legislative intent indicated by [illegible] measures in State v. McMillan, 233 N.C. 630, 65 S.E.2d 213 (1951).

> "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning, - a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature.
>
> "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison . . . . No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right."

held that the only portion of North Carolina law invalidated by Furman was the 1949 "recommendation" provision, with the result that (prospectively from the January 18, 1973, date of the Waddell decision) North Carolina law reverted to its pre-1949 state:

> "[T]he effect of the Furman decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death." (State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, 28-29(1973).)

Under these procedures, petitioner and the other 30 persons now inhabiting North Carolina's death row were sentenced to die between the date of Waddell and the date of the enactment of a new North Carolina death penalty statute on April 8, 1974. 13/

The question presented here is the federal constitutionality of death sentences imposed in North Carolina pursuant to the Waddell procedures and without new legislative authorization after Furman. Most immediately, that question is potentially decisive of the lives of the 31 condemned inmates in the State

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13/ See note 2, supra.

which now has the largest death row population in the Nation. It may also have direct implications for death sentencing in four other States.[14/] Depending, of course, upon the grounds on which this Court elects to consider the question, it may or it may not have implications -- of narrower or broader scope -- for the death penalties enacted by post-Furman legislation.

14/ The only other state appellate court that has dealt with Furman in the fashion of Waddell is the Supreme Court of Delaware, in State v. Dickerson, __ Del. __, 298 A.2d 761 (1972). The Dickerson opinion was announced prospectively on November 1, 1972. No capital convictions were returned in the State of Delaware between that date and the dates upon which, successively, (1) a new criminal code enacted before Furman but effective July 1, 1973, came into effect, repealing the statutory provisions upon which Dickerson rested, and (2) the Delaware legislature enacted a post-Furman statute effective March 29, 1974. There is presently pending litigation in the Delaware Supreme Court raising the issues of the effects upon Dickerson of the supervening code and post-Furman enactment. State v. Smith, Del. S.C. No. 52,1974.

Trial courts in Massachusetts and South Carolina have imposed death penalties after Furman under the purported authorization of pre-Furman statutes and in apparent reliance upon the rationale of Waddell and Dickerson. Commonwealth v. Brown, Clinkscales, and Johnson, Superior Ct., Suffolk Co. (Mass.), Nos. 74502-3-4 and 74516-17-18; State v. Speights, Ct. of Gen. Sess., Florence Co. (S.C.), No. 5053. It is also possible that three post-Furman death sentences imposed in Montana and Pennsylvania under pre-Furman legislation rest upon the same rationale, although the trial judges' reasoning in these cases more likely stands upon other grounds. State v. Rhodes & Shields, Mont. S. Ct. Nos. 12596 and 12597; Commonwealth v. Martin, Pa. Sup. Ct., No. 44 (March Term, 1974). All of the cases just mentioned are presently pending in the respective Supreme Courts of the States in which they arise.

A. Evasion of the Furman Decision

The narrowest issue raised is simply whether the majority of the North Carolina Supreme Court in Waddell read Furman correctly and applied Furman permissibly in holding that Furman invalidated only the 1949 "recommendation" provision of North Carolina law, rather than the underlying death penalty. As tortured as that holding may seem -- being the lethal equivalent of a state-court holding that Brown v. Board of Education required the closing of the public schools instead of their desegregation -- it is not entirely unprecedented. Twice in recent years this Court has corrected similar manipulations of state-law severability doctrines designed to emasculate a constitutional decision of the Court forbidding the imposition and carrying out of impermissible death sentences. Funicello v. New Jersey, 403 U.S. 948 (1971)(alternative ground); Thomas v. Leeke, 403 U.S. 948 (1971).

These two cases involved provisions of New Jersey and South Carolina law which allowed capitally-charged defendants to avoid the possibility of a death sentence by pleading non vult (in New Jersey) or guilty (in South Carolina), and thus affronted the rulings in United States v. Jackson, 390 U.S. 570 (1968), and Pope v. United States, 392 U.S. 651 (1968). The South Carolina Supreme Court in Thomas recognized the incompatibility of its statutory guilty-plea scheme with the constitutional principle of Jackson, but held that the result was to invalidate and sever the guilty-plea provision, leaving the death penalty standing. The New Jersey Supreme

Court attempted to distinguish Jackson but held alternatively that, if Jackson did invalidate New Jersey's non vult provision, that provision rather than the death penalty would be rendered inoperative. In both cases, then, the state-court reaction to decisions of this Court invalidating a composite statutory death-sentencing procedure under which unknown numbers of capital defendants had escaped the death penalty while others had unconstitutionally been sentenced (and many sent) to their deaths, was to sever the escape clause, treat it as though it had never existed for constitutional as well as state-law purposes, and condemn those denied its benefits to die. In both cases, this Court declined the gambit.

What a majority of the North Carolina Supreme Court has done here, albeit by a somewhat different mechanism, is much the same thing. During a quarter of a century between enactment of the legislative "recommendation" procedure in 1949 and enactment of a new post-Furman death-sentencing procedure by the North Carolina legislature in 1974, countless men died and others guilty of identical crimes were spared death pursuant to an arbitrary selective procedure which -- as the North Carolina Supreme Court itself has concluded -- falls unmistakably within the ban of Furman. The response of four Justices of that court is to say essentially that, because the persons spared should not have been spared (under an appropriate manipulation of state severability theory), the fact that they were spared is to be disregarded in determining whether the continued application of the pre-Furman North Carolina statutes authorizing capital

punishment would be arbitrary and selective, and hence a constitutionally cruel and unusual punishment, in the wake of Furman. Thirty-one more persons are thus tossed into the death column as opposed to the now closed and hence forgotten column of the spared, upon the capital punishment ledgers of North Carolina since 1949. Whether the particular state-law contrivance by which that calculation is accomplished makes the deaths of these 31 persons any less selective, arbitrary, cruel and unusual in federal constitutional contemplation is, we suggest, an issue that this Court should address, if its Furman decision is to have the vitality and respect that the Supremacy Clause rightly commands.

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B. The Lawless Imposition Of Death Penalties

The second issue presented is whether the re-institution of the death penalty which the North Carolina Supreme Court achieved by amputating life from that State's life-or-death sentencing statutes is a result that can constitutionally be effected by any device of judicial decision wholly ungoverned and undirected by legislative action. It is, of course, generally true that the federal Constitution is not concerned with how a State divides it law-making functions between its judicial and legislative organs. But that generalization cannot be permitted to sweep away the fundamental concerns of the Eighth and Fourteenth Amendments against judicial imposition of harsh criminal punishments unauthorized by law and in excess of the penalties provided by "the valid laws of the land." Giaccio v. Pennsylvania, 382 U. S. 399, 403 (1966).

Recent scholarship has underscored that the English Bill of Rights, from which the Eighth Amendment's prohibition of "cruel and unusual punishments" was derived, was in large measure directed toward preventing the exaction of unauthorized penalties.[15/] That

15/ Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CAL. L. REV. 839, 845-847, 852-860 (1969). It is true that Granucci also finds that the American Framers imperfectly understood the English background of the cruel-and-unusual-punishment clause, and that they themselves were principally concerned with the problem of intrinsically barbaric penalties. But this does not support a conclusion that the Framers meant to diminish the scope of a guarantee that they believed basic to their traditions (see 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (1863)), or to reject protections of the citizen long preserved by their English heritage. Indeed, as early as 1635, American settlers had "conceived great danger . . . in regard that . . . magistrates, for want of positive laws, in many cases, might proceed according to their discretions," and had therefore agreed "that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws." WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686, at 5 (1889). It should hardly be surprising that the cruel-and-unusual-punishment clause, like many of the other basic guarantees of the Bill of Rights, is woven of several strands and protects against more than a single evil.

function remains a vital office of the cruel-and-unusual punishment clause today,[16] although it certainly is not the exclusive focus of the clause.[17] As this Court pointed out in Weems v. United States, 217 U. S. 349, 376 (1909), the Framers were eager to assure "that government by the people, instituted by the Constitution, would not imitate the conduct of arbitrary monarchs." The conjunction of the words "cruel" and "unusual" in the Eighth Amendment can hardly be regarded as accidental if one appreciates the relationship, within a basically popular and democratic governmental structure, of the dangers of lawlessness, irregularity, arbitrary selectivity,[18] and cruelty.[19] For, in such a structure, harsh and unsufferable criminal penalties are most likely to spring from devices that evade the rule of law or subvert the ordinary protections afforded by its regularity and generality.

Due Process of Law, too, insures against the imposition of criminal sanctions that are not decreed in strict accordance with the regular course of law.

> "[T]he terms 'due process of law' . . . come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.'" Dent v. West Virginia, 129 U. S. 114, 123 (1888).

16/ See Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 STAN L. REV. 838, 855-856 (1972).

17/ See Weems v. United States, 217 U. S. 359 (1909); Robinson v. California, 370 U. S. 660 (1962); Furman v. Georgia, 408 U. S. 238 (1972). And see note 15, supra.

18/ See section I(C), pp. 28-44, infra.

19/ This relationship is developed in Brief for Petitioner, Aikens v. California, 406 U. S. 813 (1972) [No. 68-5027], pp. 13-27, 39-56.

"The essence of [the] . . . principle of legality is limitation on penalization by the State's officials, effected by the prescription and application of specific rules.[20] So rudimentary has this principle been to American notions of Due Process, that unauthorized criminal penalties have rarely been imposed in this country;[21] but, on the rare occasions when they have been examined by this Court, the Court has treated them as self-evidently void to the extent that they exceeded what was authorized by valid legislation. Ex parte Lange, 83 U. S. 163 (1874); Ex parte Mills, 135 U. S. 263 (1890); In re Bonner, 151 U. S. 243 (1894). In this century, the root principle has been most commonly observed in its offshoots: the vagueness doctrine as applied to penalties, Giaccio v. Pennsylvania, 382 U. S. 399 (1966); the lenity principle, Ladner v. United States, 358 U. S. 169 (1958);[22] and this Court's

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20/ HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960).

21/ But see-Ashton v. Kentucky, 384 U. S. 195 (1966).

22/ "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. [Citations omitted.] . . . 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' . . . This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Id. at 177-78.

adamant refusal to undertake either the judicial fashioning of criminal punishments, United States v. Evans, 333 U. S. 483 (1948), or the judicial fashioning of procedures for the imposition of criminal punishments, United States v. Jackson, 390 U. S. 570 (1968).[23] Under the rule of law guaranteed by Due Process, the creation of criminal sanctions is, quite simply, "no part of [judges'] . . . duties." United States v. Reese, 92 U. S. 214, 221 (1875).

The question here is whether the North Carolina Supreme Court has infringed that principle, or whether the state-law characterization of what was done in Waddell as a mere application of severability doctrine saves palpable judicial promulgation of the harshest penalty known to mankind[24] from the constitutional

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23/ "It is one thing to fill a minor gap in a statute -- to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." Id. at 580.

24/ See the opinion of Mr. Justice Sharp, dissenting in State v. Waddell, 282 N.C. 431, ___, 194 S.E.2d 19, 48 (1973):

> "This Court, which has consistently deplored the encroachment of other courts upon the legislative prerogatives during the past decade, now follows suit and sets its own example of judicial overreaching by changing the penalty for rape, first degree murder, arson and first degree burglary 'from death or life imprisonment in the discretion of the jury to mandatory death.'"

charge of lawlessness. The question is not, of course, whether four or three Justices of the North Carolina Supreme Court more nearly guessed what the North Carolina legislature might have wanted in the wake of Furman, in light of the fact that its last pronouncement on the subject -- a quarter-century old -- was long sealed together with the irremediable fates of those who had been chosen to live or to die under the discretionary sentencing regime for which it then unmistakably opted.[25/] Rather the question is whether judicial fiat, with nothing more than the profession of that kind of guesswork to connect it with the regular and accepted method of providing by law for the punishment of crimes, can withstand scrutiny under federal constitutional guarantees designed as limitations upon the lawless exaction of overbearing and unauthorized criminal penalties.

25/ State v. Waddell, 282 N.C. 431, ____, 194 S.E. 2d 19, 26 (1973); State v. Mathis, 236 N.C. 508, 53 S.E.2d 666 (1949); and see note 12, supra.

C. The Perpetuation of Arbitrary Discretion in the Selection of Those Who Must Die.

The third issue presented is whether the capital trial procedure approved for North Carolina by the Waddell decision violates Furman's prohibition of arbitrary selectivity in the administration of the death penalty. Although the prevailing opinions in Furman differ somewhat regarding the questions left unanswered by the Furman holding, they all condemn at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic selective processes.[26] The form of those

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26/ The concurring Furman opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-374) shared the view that the death penalty is unconstitutional per se, regardless of the presence or absence of discretion in the procedural system whereby it is applied.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional," 408 U.S. at 257, but held the death sentences under review in Furman and companion cases unconstitutional under the Eighth and Fourteenth Amendments because they were the result of a procedure which discriminated against certain defendants upon the basis of "race, religion, wealth, social position [and] class" and which "[gave] room for the play of such prejudices." 408 U.S. at 242.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question [whether "the infliction of the death penalty is constitutionally impermissible in all circumstances"], 408 U.S. at 306, since he found that the death sentences under review were "wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore in violation of the Eighth and Fourteenth Amendments. "[O]f all the people convicted of rapes and murders . . . , many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote omitted).

Mr. Justice White declined to consider the question of whether "the death penalty is unconstitutional per se," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

processes can hardly be thought constitutionally dispositive. See Commonwealth v. A Juvenile, 1973 Mass. Adv. Sh. 1199,.300 N.E.2d 434 (1973).[27] What is important is their result: a lawless and capricious dispensation of life and death, in which death sentences are "freakishly imposed." Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring).

In considering whether the Waddell procedures comply with Furman or whether the North Carolina Supreme Court has merely displaced the focus, lowered the visibility, diffused the responsibility, and thereby increased the predictable arbitrariness and discrimination of persisting discretionary processes for the administration of the death penalty,[28] this Court will

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27/ In this case, the Supreme Judicial Court of Massachusetts ruled that Furman invalidated a death sentence under a "mandatory" death penalty statute, if arbitrary procedures made it possible for some defendants to escape being subjected to the extreme punishment. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was "mandatory" under Mass. Gen. Laws Ann. c.265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since Furman invalidated "discretionary imposition of the death sentence," 300 N.E. 2d at 442 (emphasis in original), regardless of where in the process this discretion was lodged.

28/ The discretion which is concealed but inevitable in a purportedly "mandatory" death-sentencing system is likely to be influenced by impermissible considerations to at least as great an extent as the visible discretion that Furman found unconstitutional. North Carolina's experience with a "mandatory" statute prior to 1949 reflects this point. Between 1910 and 1949, 75% of all persons received under sentence of death were non-white; between 1950 and 1972, 63% of those so received were non-white. Similarly, 80% of persons executed under the pre-1949 "mandatory" system were non-white; 73% of executions under the post-1949 "discretionary" system were of non-whites. (Data compiled from BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3, (North Carolina Office of Corrections, September

want to consider the following characteristics, among others, of North Carolina law and practice:

28/ cont'd.

1973)). It appears that under the "mandatory" system created by the Waddell decision similar forces are at work: as of June 1, 1974, 24 of the 34 defendants condemned to die for crimes committed between January 18, 1973 (the date of Waddell) and April 8, 1974 (the effective date of the new North Carolina capital punishment statute), or 71%, are non-white, approximately the percentage of those condemned to die who were non-white under the pre-Furman "mandatory" system. Death sentences have been affirmed or imposed under the Waddell procedures in the following cases:

State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974); State v. Dillard, 285 N.C. 72, 203 S.E.2d 6 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd __ N.C. __, 203 S.E. 2d 786 (April 10, 1974); State v. Monk, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Britt, Robeson County Superior Ct., No. 73-Cr-6567 (September 6, 1973), rev'd ___ N.C. ____, ___S.E.2d ___, N.C. Sup. Ct. No. 36 (Robeson) (May 15, 1974); State v. Spicer, New Hanover County Superior Ct., No. 73-Cr-8034 (September 12, 1973), rev'd ___ N.C. ___, ___S.E.2d ___, N.C. Sup. Ct. No. 25 (Hanover) (May 15, 1974); State v. Ward, Edgecombe County Superior Ct., No. 73-Cr-6706 (September 19, 1973); State v. Fowler, __ N.C. __, 203 S.E.2d 803 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974); State v. Bell, Robeson County Superior Ct., No. 73-Cr-12351 (October 18, 1973); State v. Sparks, Guilford County Superior Ct., No. 73-Cr-19776 (November 1, 1973); State v. Anthony Carey, Mecklenburg County Superior Ct., No. 73-Cr-46179 (November 8, 1973); State v. White, Alamance County Superior Ct., No. 73-Cr-12672 (December 6, 1973); State v. Brown, Edgecombe County Superior Ct., No. 72-Cr-7238 (December 9, 1973); State v. Hines, Edgecombe County Superior Ct., No. 73-Cr-7239 (December 9, 1973); State v. Walston, Edgecombe County Superior Ct., No. 73-Cr-7378 (December 9, 1973); State v. Albert Carey, Mecklenburg County Superior Ct., No. 73-Cr-6158 (December 11, 1973); State v. Vick, Beaufort County Superior Ct., No. 73-Cr-5687 (December 12, 1973); State v. Lampkins, Forsyth County Superior Ct., No. 73-Cr-43023 (January 19, 1974); State v. Pruitt, Cumberland County Superior Ct., Nos. 73-Cr-35545, 35546 and 35548 (January 29, 1974); State v. Williams, Wake County Superior Ct., No. 73-Cr-32521 (January 31, 1974); State v. Woods, Catawba County Superior Ct., Nos. 73-Cr-20546 and 20545 (January 28, 1974); State v. Patterson, Forsyth County Superior Ct., No. 73-Cr-22457 (February 5, 1974); State v. McCall, Transylvania County Superior Ct., Nos. 73-Cr-1828 and 1829 (February 9, 1974); State v. Avery, Bertie County Superior Ct., No. 73-Cr-2347 (February 17, 1974).

1. Prosecutorial Discretion.

In North Carolina, the Solicitor is charged with the duty to "prepare the trial dockets [and] prosecute in the name of the State all criminal actions requiring prosecution in the superior and district courts of his district," N.C. Gen. Stat. §7A-61 (1971 Cum. Supp.). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions, State v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953), including not only absolute discretion whether and what to charge, but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment, State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971); and see State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951). The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is State v. Casey, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that

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28/ cont'd.

State v. McLaughlin, Robeson County Superior Ct., Nos. 73-Cr-18024, 74-Cr-228, 74-Cr-229, 74-Cr-230, 74-Cr-231, 74-Cr-232 (February 28, 1974); State v. Burns, Onslow County Superior Ct., No. 74-Cr-1012 (March 1, 1974);

there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The Court rejected this contention, commenting that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And the majority opinion in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that either the Eighth or the Fourteenth Amendment required any limitation of the unfettered discretion of the Solicitor: "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

Without any guidance whatsoever, then, a Solicitor is free to make the decision whether an indictment will be sought for first or second degree murder, for rape or assault to rape. He may thus "without violating [his] trust or any statutory policy . . . refuse to [seek] the death penalty no matter what the circumstances of the crime." Furman v. Georgia, supra, at 314 (Mr. Justice White concurring). This prosecutorial discretion doubtless accounts in considerable part for the striking fact, for example, that there have been only two convictions[29/] for

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29/ State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd ___ N.C. ___, 203 S.E.2d 786 (April 10, 1974). State v. Henderson, Alamance County Superior Ct., No. 73-Cr-7771 (September 5, 1973), aff'd 285 N.C. 1, 203 S.E.2d 10 (March 13, 1974), petition for cert. filed, June, 1974 (No. 73-). The petitioner in Henderson was also convicted and sentenced to die for the crime of rape.

first degree burglary during the past year of Waddell's implementation in a State where there were about forty convictions annually for this crime in the recent past,[30] and where 39,210 "burglaries and housebreakings" were reported in 1972.[31] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary prosecutions despite clear evidence of this crime.

A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under the regime of Waddell. In State v. Spicer, N.C. Sup. Ct., No. 25 (New Hanover), decided May 15, 1974, two persons were tried and convicted for murder during the course of an armed robbery.[32] A third person, one Brailford, had helped plan the

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30/ In 1955, the North Carolina Department of Justice ceased keeping separate statistics for persons convicted of First Degree Burglary and Second Degree Burglary. The Biennial Report of the Attorney General, Vol. 32 at 515, reveals that in 1952, there were 47 convictions for First Degree Burglary (with 15 "Other Dispositions" of First Degree Burglary charges); in 1953, there were 33 convictions for this crime, with 10 "Other Dispositions," ibid.; in 1954, there were 35 convictions and 26 "Other Dispositions," ibid., Vol. 33 at 377.

31/ FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 1972 (Aug. 1973) at 74. The FBI Uniform Crime Report statistics reflect reported crimes, not convictions, and the reported "burglaries and housebreakings" are not necessarily equivalent to the total number of statutory First Degree Burglaries which occurred in the State during 1972.

32/ The conviction of Isaac Monk, also found guilty of first degree murder and sentenced to death in this incident, is pending on appeal in the North Carolina Supreme Court. Monk v. State, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973).

robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." Id., slip op. at 9. The Court thus described Brailford's role in the crime:

> "[T]he State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated that he expected his cut . . . . The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Id., supra, at 10-11.

2. Plea Bargaining.

Under the Waddell procedures, there is no limit on the power of a Solicitor to accept a plea of guilty to a lesser included offense by a defendant charged with a capital crime, or to nol pros a capital indictment entirely. It is unclear how much plea bargaining in capital cases occurs in North Carolina,[33/] but the critical point is that it is utterly unregulated: the discretion of a Solicitor to accept a plea to a lesser offense in a capital case being quite as untrammelled as the freedom of a jury to recommend mercy in a pre-Waddell capital case. One instance of that discretion is State v. Wiggins, Bertie County Superior Ct., No. 73-Cr-2383, in which a 14 year old defendant was indicted for the rape of a nine year old girl, a potentially capital offense. On February 19, 1974, the defendant was permitted to enter a guilty plea to charges of assault with intent to rape and of assault with intent to kill, and received sentences of fifteen years and five years.

33/ Guilt pleas are said to account for up to 90% of all criminal convictions in the United States. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

Such cases doubtless reflect the long-recognized function of plea bargaining under a purportedly "mandatory" sentencing statute: it "provides the opportunity to individualize justice . . . . Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[34/]

34/ Heath, "Plea Bargaining -- Justice Off the Record," 9 WASHBURN U.L. REV. 430, 455 (1970).

3. Jury Discretion

Even when a North Carolina jury has no admitted sentencing discretion, it still retains power to spare a capital defendant's life by finding him guilty of a lesser included offense. If there is any evidence to support the finding of such an offense, a defendant may demand a lesser-included-offense instruction as a matter of right.[35] N.C. Gen. Stat. §15-170 provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of any attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime . . . ."

35/ "If . . .there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." State v. Knight, 284 N.C. 384, 391, 103 S.E.2d 452, 456 (1958) (quoting State v. Spivey, 151 N. C. 676, 686, 65 S.E. 995, 999 (1909)); State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right, State v. Hicks, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); State v. Dubois, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Roseman, 279 N.C. 573, 184 S.E.2d 289 (1971); State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971); State v. Brown, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); State v. Cox, 201 N.C. 357, 160 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); State v. Beard, 207 N.C. 673, 178 S.E. 242 (1935); State v. Satterfield, 207 N.C. 118, 176 S.E. 466 (1934). However, if such a charge is given and if a defendant is convicted of the lesser included offense, the conviction will nevertheless be affirmed on appeal, even if it appears irrational on the facts of the case. See State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), and discussion, infra.

And N.C. Gen. Stat. § 15-169 provides that:

> "[o]n the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

The right to a lesser-included-offense charged is considered so important in North Carolina that its omission is held to be reversible error even when the defendant fails to request such a charge. State v. Wagoner, 249 N.C. 637, 107 S.E.2d 63 (1959); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970). See State v. Moore, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); State v. DeGraffenreid, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). The Supreme Court of North Carolina has frequently reversed convictions for capital offenses[36/] because the trial court failed to give a charge on second degree murder,[37/] voluntary

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36/ The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

37/ State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936); State v. Gause, 227 N.C. 26, 40 S.E.2d 463 (1946); State v. Knight, 264 N.C. 384, 103 S.E.2d 452 (1958). When the State attempts to prove "Willful, deliberate and premeditated killing," N.C. Gen. Stat. § 14-17, which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. § 15-172, and since "the jury alone may determine whether an intentional killing has been establish where no judicial admission of the fact is made by the defendan State v. Todd, 264 N.C. 524, 529, 142 S.E.2d 154, 158 (1965). See also, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

manslaughter,[38] or involuntary manslaughter[39] in first degree murder cases, or because it failed to charge on assault with intent to rape in rape cases.[40]

Moreover, a jury may be charged on a lesser included offense where there is no evidence to support such a charge, and a conviction for the lesser offense will be sustained on appeal.[41]

38/ State v. Merrick, 171 N.C. 788, 88 S.E. 501 (1916); State v. Robinson, 188 N.C. 784, 125 S.E. 617 (1924); State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959). Cf. State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

39/ State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971). Cf. State v. Denny Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

40/ State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923). See also, State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957); State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Webb, 20 N.C. App. 199, 200 S.E.2d 840 (1973). Cf. State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 116-118 (1972) (Bobbitt, CJ, dissenting). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." State v. Green, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

41/ The Supreme Court of North Carolina has occasionally disapproved of this practice, State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); State v. Allen, 279 N.C. 115, 181 S.E.2d 453, 457 (1971); State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917). In State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In State v. Quick, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

> "Suppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the state, and not to him." 42/

42/ "An error on the side of mercy is not reversible . . . ." State v. Fowler, 151 N.C. 731, 66 S.E. 567 (1909). Accord: State v. Rowe, 155 N.C. 436, 71 S.E. 332, 337 (1911). See also State v. Ratcliff, 199 N.C. 9, 153 S.E. 605, 606 (1930); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); State v. Vestal, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939).

In State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "If we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then . . . [and] [w]hen they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

To insure that the jury is aware of the consequences of its decision in a capital case, the Supreme Court of North Carolina recently ruled that if "the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence . . . sufficient compelling reason exists to justify . . . informing the jury of the consequences of their possible verdicts." State v. Britt, N.C.Sup.Ct., No. 36 (Robeson), decided May 15, 1974, [Appendix D, infra] slip op. at 16. The Court also ruled that "[c]ounsel may, in his argument to the jury, in any cse, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged . . . .[He may] in his argument to the jury . . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." Id. at 17-18. This holding implements the power of the jury to avoid imposing the death penalty in a

sympathetic case, either by convicting of a lesser included offense or by returning a verdict of not guilty.[43/] Thus, under North Carolina law, a double level of discretion may affect the jury's choice of a life or death verdict in a case where all the evidence points to guilt of a capital offense or of nothing: the trial judge has discretion to submit such lesser offenses, and the jury has discretion to commit for them.

43/ Wicker, "Christmas on the New Death Row," New York Times, Dec. 25, 1973, p. 18, col. 1:

> "Raleigh, N.C. Dec. 24 . . . In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; . . . Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

4. Executive Clemency.

The North Carolina Constitution provides that:

> [T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. Article III, §5(6).

Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of two hundred thirty-five (235) of three hundred fifty-eight (358) condemned prisoners were commuted. The chief executive has thereby commuted 65.6 percent of the death sentences imposed in the State over a sixty year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature the right to prescribe the "manner of applying for pardons" but leaves the grant or denial subject only to "such conditions as [the Governor] may think proper." Indeed, the Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> [i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

Under a procedural system in which the death penalty is purportedly "mandatory," the clemency authority has commonly functioned as the aspect of the criminal jutice system that responds to "mitigating factors" -- factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the exaction of punishment.[44/] A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations or death sentences after the 1947 and 1949 statutory amendments giving juries the option of imposing life sentences for the four crimes which had theretofore carried mandatory death penalties.[45/] By withdrawing that option from juries in 1973, the Waddell decision obviously displaced, but equally obviously did not reduce, the operation of discretionary selectivity in North Carolina's death-sentencing practices.

44/ Note, Executive Clemency in Capital Cases, 39 N.Y.U.L.REV. 136, 165-166 (1964).

45/ Johnson, Selective Factors in Capital Punishment, 36 SOCIAL FORCES, 165, 166-7 (1957). Behre notes that while 64 percent of condemned persons escaped execution between 1910 and 1948, the percentage of those escaping execution dropped to 38 percent for the period between 1949 and 1962. Undoubtedly, a large proportion of condemned persons who avoided the death penalty did so by commutation. BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3. (North Carolina Office of Corrections, September 1973).

D. The Inconsistency Of The Death Penalty With Contemporary Standards of Decency

Eighth Amendment standards are not static, and the prohibitions of the cruel-and-unusual punishment clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U. S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 370 U. S. 660, 666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of hoary criminal punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 325-328 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," draws upon advanced medical science and sciences of human behavior. We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime; nor can we ignore today the the truism that government remains "the potent, the omnipresent teacher"[46/] even when it chooses to

46/ Olmstead v. United States, 277 U. S. 438, 485 (1928) Justice Brandeis, dissenting).

teach the overriding lesson of capital punishment "'that a man's life ceases to be sacred when it is thought useful to kill him.'" 47/ While we have not abandoned the essential moral and social proposition that the citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments, a partial diminution of retributive sentiment, and a guarded, but increased optimism about the possibilities of rehabilitation. 48/ At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution

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47/ Camus, Reflections on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH 173, 229 (1961).

48/ ". . . a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken a law, could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968), at 1.

is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human life."[49] Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." 408 U. S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons[50]--who were, for the most part, members of

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49/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 291 (1971).

50/ "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

powerless or despised minorities--to die in secret for crimes punished less severely in the vast majority of cases.[51]

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 300 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "The objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U. S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and members of outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishment legislation since Furman, the imposition of the

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ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), p. 143.
The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Of the 3,859 persons executed under civil authority in the United States between 1930 and 1968, only 191 were executed during the 1960's and only 25 were executed after 1963. No one has been executed in the United States since 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 (August 1970).

51/ Justice Douglas quoted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that "'the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'" Furman, supra, at p. 249. See also the concurring opinions of Justice Stewart, at p. 310, and Justice Marshall, at pp. 364-366. Justice Marshall noted that "American citizens know almost nothing about capital punishment." Indeed, ignorance of the details of execution is insured by law in that every American jurisdiction now

death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the State of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third: The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a moral development which has produced an increased respect for life and a concommittant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution. 52/ Increased respect for

51/ (Cont'd)

forbids public executions. Movements to Abolish the Death Penalty in the United States, 284 ANNALS 124, 127-130 (1952).

52/ ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." SELLIN, THE DEATH PENALTY (1959) 15.

life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Thus executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and sobering possibility that human error or a denial of due process could send a man to his death. 53/

The enormity of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United States is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man. Under a legal system which postpones execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe toll.

As the California Supreme Court has pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 894 (1972).

53/ See Black, "The Crisis in Capital Punishment" 31 MD. L. REV. 290, at 295-300 (1971).

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The condemned prisoner, even more than the expatriate, is subjected to the "fate of ever-increasing fear and distress." Trop v. Dulles, 356 U. S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). The stress of awaiting execution frequently produces insanity, see Solesbee v. Balkom, 339 U. S. 9, 14 (1950) (Justice Frankfurter, dissenting), or other extreme manifestations of psychological compensation.

Moreover, existing data suggests what imagination intuits: there is likely to be unmeasurable physical pain before consciousness is lost. "Although our information is inconclusive, it appears that there is no method available that guarantees an immediate and painless death." Furman v. Georgia, supra, at 287 (Mr. Justice Brennan concurring).

And there is, finally the enormity and irreversibility of the act of condemning and terminating a human existence -- an act which denies absolutely the very thing which the Eighth Amendment was created to protect: the dignity of man.

The moral development which has accompanied advances in understanding of the causes and control of crime and which is reflected in the increasing world-wide disinclination to impose the punishment of death calls upon this Court now to consider the question of the legitimacy of that punishment under the Eighth Amendment's measure: "the evolving standards of decency that mark the progress of a maturing society."[54/]

54/ Trop v. Dulles, 356 U. S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

Appendix C

Pp. 19-22, Petition for Writ of Certiorari to the Supreme Court of North Carolina, Noell v. North Carolina, No. 73-6876 (filed June 11, 1974).

(D) Whether the death penalty is so inconsistent with contemporary standards of decency as to violate the Eighth and Fourteenth Amendments.

The remaining Eighth Amendment issue presented by this case is whether the death penalty is an excessive, disproportionate and aberrational punishment for the crime of rape when that crime results in no considerable bodily injury. The question is one on which a conflict apparently exists between the North Carolina Supreme Court and the cognizant federal Court of Appeals. See Ralph v. Warden, 438 F.2d 786, 793 (4th Cir. 1970) cert. denied 408 U.S. 942 (1972).

Restraints upon excessive punishment run deep in the Anglo-American tradition,[13/] and their expression in the Eighth Amendment was a principal ground of decision in Weems v. United States, 217 U.S. 349 (1910). Although the punishment involved in Weems was peculiar and outlandish in nature, condemnation of it rests expressly upon the oppressiveness of that punishment for the crime of falsifying public records, and its consequent lack of "adaptation of punishment to the degree of crime." 217 U.S. at 365. See also O'Neil v. Vermont, 144 U.S. 323, 337, 339-340 (1892)(Justice Field dissenting);[14/] Hart v. Coiner, 483

13/ Magna Carta contains three chapters requiring that amercements be proportioned to the measure of magnitude of offenses. MAGNA CARTA, ch. 20-22 (1215), printed in ADAMS & STEPHENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY (1926)42,45.

14/ Justices Harlan and Brewer agreed with Justice Field that O'Neil's long jail sentence was excessive "in view of the character of the offences committed," 217 U.S. at 366, 371, which were liquor law violations. The majority of the Court declined to reach the merits of the question because it was not properly presented and because the Eighth Amendment was not then viewed as a restraint upon the States. 217 U.S. at 331-332.

F.2d 136, 139 (4th Cir. 1973), cert. denied, ____ U.S. ____, 39 L.Ed.2d 881 (1974)

This constitutional requirement of adaptation is not Procrustean: it does not command a commensurability of crime and punishment that neither legislatures nor courts, nor the sciences of penology, are sufficiently informed to calibrate. See Packer, Making the Punishment Fit the Crime, 77 HARV. L. REV. 1071, 1078-1080 (1964). However, it would ignore the entire experience of our criminal law system to deny that the grading of offenses by their seriousness is endemic to it; and, in this context, the Eighth Amendment's prohibition of cruel and unusual punishments must impose some restriction upon the power of a State to proceed aberrantly in affixing maximum penalties to grades of crime.

In assessing the death penalty for rape as that penalty was reinstituted in North Carolina by State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), this Court is not left without compelling benchmarks. For the fact is that such a punishment today is aberrant in the farthest extreme. Rape is everywhere regarded as a serious offense, but it is punished by death in only four countries outside the United States: Taiwan, Zambia, Malawi, and the Republic of South Africa.[15/] Prior to the

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15/ UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968), pp. 40, 86. This survey was based upon responses received from governments or "national [United Nations] correspondents" in 109 countries and colonies. Ibid. at 4-5.

Furman decision, sixteen American States and the federal government authorized a discretionary death penalty for rape.[16] However, as of June 1, 1974, only Georgia,[17] North Carolina,[18] and perhaps Louisiana[19] impose the death penalty for the rape

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16/ 18 U.S.C. §2031 (1971); Ala. Code, tit. 14 §395 (Recomp. Vol. 1958); Ark. Stat. Ann. §41-3403 (Supp. 1969); Fla. Stat. Ann. §794.01 (1965); Ga. Code Ann. §26-2001 (1969); Ky. Rev. Stat. Ann. §435.090 (1969); La. Rev. Stat. Ann. §14:42 (1950) and La. Code of Crim. Proc., Art. 817 (1971); Md. Code Ann., art 27, §461 (Repl. vol. 1967); Miss Code Ann. §2358 (Recomp. Vol. 1956); Vernon's Ann. Mo. Stat. §559.260 (1953); Nev. Stat. §§200.363, 200.400 (1968); N.C. Gen. Stat. §14-21 (Repl. Vol. 1969); Okla. Stat. Ann., tit. 21, §1115 (Supp. 1970); S.C. Code Ann. §16-72 (1962); Tenn. Code Ann. §39-3702 (1955); Vernon's Tex. Pen. Code Ann., art. 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960).

17/ No. 74, Ga. 1973 Sess. Laws, at 164-165, amending Ga. Code §27-2534.1.

18/ North Carolina's new capital punishment legislation imposes the death penalty for "first degree rape," defined as rape accomplished through use of a deadly weapon or attended by "serious bodily injury" or a rape where the defendant is over sixteen years of age and the victim is "a virtuous female child under the age of twelve years." N.C. Gen. Stat. §14-21, as amended by Sec. 2, Chap. 1201, 1973 N.C. Sess. Laws.

19/ State v. Selman, La. Sup. Ct. No. 54376 (June 10, 1974) (the time to seek rehearing has not expired as of the date of the filing of this petition for certiorari. See La. Sup. Ct. Rule IX, § 1).

of an adult woman, while two other States make certain rapes of children capital.[20] Eleven of the sixteen States that punished rape with death before Furman have now abandoned the death penalty entirely for this crime.[21] And the North Carolina General Assembly itself, acting after the affirmance of petitioner's death sentence, has ceased to use death to punish the wide range of rape offenses made capital by the State's Supreme Court in Waddell.

20/ The new Florida statute imposes the death penalty for rape if the victim is under 11 years old and the defendant is 17 or older. Fla. Stat. §921.141 (1972). The new Tennessee statute imposes the death penalty for rape, if the victim is under twelve years of age. Tenn. Code §39-2402, as amended by Pub. Chap. 462, Tenn. Laws 1974.

21/ Arkansas, Kentucky, Mississippi, Nevada, Oklahoma, and Texas have enacted new death penalty statutes that do not make rape a capital crime. Alabama, Missouri, Maryland, South Carolina, and Virginia have not enacted any death penalty legislation after Furman.